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The effect of the Senate reservations in its resolution of ratification of 15 July 1953 on certain aspects of the Status of Forces Agreement.

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THE EFFECT OF THE SENATE RESERVATIONS IN ITS RESOLUTION OF RATIFICATION OF 15 JULY 1953 ON CERTAIN ASPECTS OF THE STATUS OF FORCES AGREEMENT

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THE EFFECT OF THE SENATE RESERVATIONS IN ITS RESOLUTION OF RATIFICATION OF 15 JULY 1953 ON CERTAIN ASPECTS OF THE STATUS OF FORCES AGREEMENT

A Thesis

Presented to

The Judge Advocate General's School

The opinions and conclusions expressed here are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency. Reference to this study should include the foregoing statement.

by

Commander W. N. Jackson, 424997, U.S. Navy

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SUBJECT

[illegible] of doubtful intent, as expressed in the Resolution of [illegible], regarding, [illegible] of United States personnel by local [illegible] determination of the nature and scope of "constitutional [illegible] (i.e. service am) would only in the United States" as further [illegible] paragraph of the Resolution; critical study of [illegible] local [illegible] as a result of the [illegible].

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CHAPTER I INTRODUCTION

The North Atlantic Treaty Organization Status of Forces Agreement is a multilateral treaty entered into by the United States and most of the other nations of that organization. Its purpose is to resolve the multitude of legal and jurisdictional problems which resulted from the stationing of troops of one or more NATO nations in other NATO countries. In testifying in support of the treaty before the Senate Foreign Relations Committee, Secretary of Defense Wilson declared, "It became apparent early in the creation of the North Atlantic Treaty Organization that these (legal and jurisdictional) problems might best be solved on a multilateral basis." (Here the secretary spoke of the many technical legal problems resulting from the stationing of troops of one country in another country.)[1] General Bradley, U.S. Army, declared before the same committee that the advantages of the Status of Forces Agreement to the United States, as a member of NATO, are twofold. "- - - - First it enables the Commander of a United States military force to engage in peacetime NATO operations in NATO countries without undue hindrance from the authorities of those countries. Second, it confers upon individual members of the United States forces stationed in NATO countries certain rights which are essential to their

[1] Hearings Before the Committee on Foreign Relations United States on Status of the North Atlantic Treaty Organization, Armed Forces and Military Headquarters, 83d Cong. 1st Sess., p. 10 (1953)

morale and well-being."[2]

The treaty was initially drafted by the Department of Defe in 1950. Negotiations were entered into among all members of NATO the following year. It was signed by representatives of such nations in London England on 19 June 1951. Hearings on th treaty were conducted before the United States Senate Foreign Relations Committee on 17-18 April 1953. Shortly thereafter it was reported to the Senate. On 24 June 1953 it was referred back to the Senate Foreign Relations Committee for supplementar hearings in order to consider certain objections raised by a group of Senators led by Senator Bricker of Ohio. Eventually i was reported back to the Senate where it was approved by a substantial majority thereof.[3] However, as a condition to ratification the Senate incorporated into the treaty certain reservations. In due course the treaty, including these reservations, was signed by the President.

These reservations pose certain problems to the cognizant commanding officer of United States military forces stationed in the various NATO nations. It is clear that he is charged with the duty of determining, where appropriate, the extent of legal safeguards afforded by the criminal laws of the particular stat in which his troops are stationed, that where he determines tha these safeguards do not measure up to American standards he is

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[2]Ibid., pp. 33-34.
[3]Fifteen Senators voted against ratification.

to request certain relief from the authorities of the receiving state, and that where such relief is not granted he is to seek the assistance of the United States State Department. However, the reservation does not define any clear standards by which such commanding officer is to be guided. It merely declares that the commanding officer shall insure, to the extent and in the manner specified, that members of his command shall be accorded those "constitutional rights (they) would enjoy in the United States."[4]

The primary purpose of this study is to ascertain and clarify those considerations with which the cognizant United States Commanding Officer should concern himself in implementing the Status of Forces Agreement as modified by the Senate Resolution. In furtherance of this purpose an appraisal of the Senatorial intent implicit in the Resolution will be made. Necessarily bearing upon this Senatorial intent are the extent of the Constitutional rights servicemen would be entitled to in the United States when tried for criminal offenses and the extent of any equivalent protection afforded by the criminal procedures of NATO nations, and by the provisions of the Status of Forces Agreement itself.

Chapter II of this study constitutes a survey of those minimum rights and safeguards accorded by the Federal Constitution to accused persons tried by criminal courts in the United States. Chapter III encompasses a study of the rights and safeguards

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[4]See Appendix A

created by the Status of Forces Agreement and Chapter V appraise
the Senatorial intent of its Resolution of 15 July 1953.

CHAPTER II A DETERMINATION OF THE NATURE AND SCOPE OF "CONSTITUTIONAL RIGHTS A SERVICEMAN WOULD ENJOY IN THE UNITED STATES" AS CONTEMPLATED IN PARAGRAPH 3 OF THE RESOLUTION

Constitutional Guarantees Within the Meaning of the Resolution

American servicemen who commit offenses within the United States may, depending upon the circumstances of the case, subject themselves to three different jurisdictions: state, federal c military. Experience shows that few servicemen are tried by Federal Courts. The great majority of criminal trials, other than courts martial, of servicemen in the United States are conducted in state criminal courts. These rights and safeguards guaranteed defendants tried in Federal courts are, therefore, of much less significance and importance than those accorded defendants in state courts. For the purposes of this study the former may quite safely be ignored.

Paragraph 3 of the Resolution of Ratification, with Reservations, as agreed to by the Senate on 15 July 1953 provides as follows: "If, in the opinion of (the Commanding Officer of the armed force of the United States in the receiving state), under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, t commanding officer shall request the authorities of the receiv state to waive jurisdiction in accordance with the provisions of paragraph 3 (c) of Article VII (which requires the receiving

state to give 'sympathetic consideration' to such request) and such authorities refuse to waive jurisdiction, the commanding officer shall request through diplomatic channels and notification shall be given to the Executive Branch to the Armed Servic Committees of the Senate and House of Representatives."[1] The Resolution, therefore, does not expressly specify those particular kinds of Constitutional guarantees contemplated by the Sen However, the Resolution does direct the State Department to ma a formal protest to the foreign government through diplomatic channels in the event that any serviceman is deemed to have be denied the equivalent of such rights by a foreign tribunal. It would appear that any such protest, to be tenable, would necessarily have to show that the rights, allegedly denied the serviceman in a foreign tribunal, would have been accorded him had he been tried for the same offense by a state criminal court anywhere in the United States. To argue that he would have receiv more rights had he been tried in a Federal court ignores the fact that he likely would never have been tried in such court had the same offense been committed by him in the United States. Again, to argue that he would have received more rights had he been tried in a state court of the state of his domicile is to disregard the facts of military life, since servicemen are rarely stationed in their home states. Thus, a New Yorker may well find himself serving his term of duty in California or in

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[1]See Appendix A.

Mississippi. An assertion that the serviceman would receive more rights if tried by a United States military court martial appears at first sight to be more persuasive. However, any particular offense committed by a serviceman in a NATO nation would as likely be tried before such court martial as if committed in the United States.

Two cogent reasons exist, therefore, for predicating the determination of the nature and scope of "Constitutional rights a serviceman would enjoy in the United States" upon those minimum rights which he would enjoy if tried for a criminal offense in a state court: (a) the much greater importance, in point of frequency of occurrence, of trials by state courts, and (b) the necessity for basing any State Department protest upon a convincing showing that the accused would have inevitably received more rights had he been tried for the same offense in a non-military court anywhere in the United States.

Those minimum rights which a state court must accord defendants who are tried in their criminal courts are governed by the due process clause of the Fourteenth Amendment to the Federal Constitution. It will be appropriate, therefore, to briefly examine the general construction placed upon the due process clause by our Federal courts insofar as it applies to such proceedings.

General Construal of the Due Process Clause

A long line of Federal decisions has interpreted the due

process clause of the Fourteenth Amendment as affording certa rights and safeguards to persons tried by state courts for criminal offenses. These rights and safeguards are not coextensive with those afforded persons tried for criminal offens by Federal courts. "The Fourteenth Amendment does not say th no State shall deprive any person of liberty without followin the Federal process of law as prescribed for the Federal court in comparable Federal cases. It says merely, 'nor shall any state deprive any person of life, liberty or property without due process of law'. This due process is not equivalent for the process of Federal courts or for the process of any particular state. It has reference, rather, to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions.

In Wolf v Colorado[3] the court said, "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments and thereby incorporates them has been rejected by this court again and again after impressive consideration. The issue is closed."

These rights and safeguards guaranteed by the Fourteenth

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[2]Bute v Illinois, 333 U.S. 640 (1948). See also Betts v Brady, 316 U.S. 455 (1942).

[3]338 U.S. 25 (1949).

Amendment are those which are essential to a free society but no more than that. The broad test, repeatedly employed by the United States Supreme Court, in determining the extent of those rights and safeguards is that state criminal proceedings, taken as a whole, must not offend common and fundamental ideas of fairness and right.[4] "Due process of law" under the Fourteenth Amendment is satisfied if the criminal procedures, afforded the defendant by state criminal courts, conform to standards deemed reasonable and right.[5] Even though a decision of a state court upon a question of local law is wrong it is not an infraction of the Fourteenth Amendment merely because it is wrong.[6] Nor does the Federal Constitution impose any impediment to the correction or modification by a state court of erroneous or older constructions of local law embraced in previous decisions.[7] However, "due process of law - - - - conveys neither formal nor fixed nor narrow requirements. - - - - Basic rights do not become petrified as of any one time, even though as a matter of human experience, some may not rhetorically be called eternal verities. - - - - Representing as it does a living principle due process is not confined within a permanent catalogue of what may

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[4]Betts v Brady, note 2 supra.

[5]In Palko v Connecticut, 302 U.S. 319 (1937) the court said, "Certain rights set forth in the Federal Constitution may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

[6]Stockholders v Sterling, 300 U.S. 175 (1937).

[7]Wolf v Colorado, note 3 supra.

at a given time be deemed the limits of the essentials of fundamental rights. To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society."[8] From the foregoing it is clear that specific Federal decisions, rather than general formulae, must be resorted to in determining whether the due process clau of the Fourteenth Amendment has been violated in any particula case.

For convenience, the various Federal decisions relating to the due process clause of the Fourteenth Amendment are herein considered from the standpoint of three broad general categori (a) those rights and safeguards which it insures to an accused prior to trial, (b) those rights and safeguards which it insur to an accused during trial, and (c) those rights and safeguard it insures to an accused subsequent to trial.

Rights of an Accused Accorded by Due Process Prior to Trial

The Federal courts have ruled upon a number of situations, arising prior to trial, as possibly affecting basic rights of accused persons. No doubt others will come before those court from time to time in the future. To date six general categori of such possible rights have reached the Federal courts for

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[8] Ibid.

decision. They are commented upon herewith.

Intelligibility of State Penal Statutes

The terms of a state penal statute, which creates a new offense, must be sufficiently clear and explicit so as to unequivocally inform those who are subject to it of the kind of conduct on their part which will render them liable to its penalties.[9] A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essentials of due process.[10] The statute which was the subject of the decision in the Lanzetta case reads as follows: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other state, is declared to be a gangster." The court held that the conduct which the statute purported to denounce was so vague, uncertain and indefinite as to be repugnant to due process.

A statute may be vague and uncertain and yet rendered valid provided that the indictment, based upon such statute, sufficiently apprises the accused of the offense intended to be charged. Thus,

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[9] Lanzetta v New Jersey, 306 U.S. 451 (1939).

[10] In Connally v General Construction Co., 269 U.S. 385 (1925) the court held that the test to be applied in determining this issue is whether the statute establishes a standard well enough known to enable those within (its) reach to correctly apply it.

in United States v Franz[11] the United States Court of Military Appeals held that Article 134 of the Uniform Code of Military Justice did not violate any Constitutional proscriptions where the specification, based upon that article, spelled out the alleged offense in sufficient detail for the accused to be able to intelligently prepare his defense. In that case, however, the court pointed out that the provisions embodied in Article 1 of the Code had been part of our military law since 1775, and that therefore the general kinds of conduct proscribed by that article were well known to American military law. On the other hand, the court declared in the Lanzetta case[12] that on the fac therein the specification of the details of the offenses intend to be charged in the indictment did not cure the statute of its repugnancy to due process where the statute is vague and uncert The two decisions do not appear to be contradictory, for in the Lanzetta case usage had not determined the meaning of the word, "gangster."

In determining whether a particular statute violates due process, therefore, consideration must be given to the indictme Where the latter spells out the alleged offense in sufficient detail it may operate to remove the statute's Constitutional repugnancy provided that usage and custom have served to make reasonably certain the kinds of conduct contemplated by the statute.

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[11] 2 USCMA 161 (1952).
[12] note 9, supra.

Right to Certainty of Charges

Irrespective of the certainty of the statutory language upon which it is based, an indictment must be spelled out in such precise and unambiguous terms as to enable the defendant to understand the offense intended to be charged and to enable him to prepare his defense. In Cole v Arkansas[13] the defendant was charged with a violation of a particular statute which consisted of two sections. The indictment failed to spell out in sufficient detail that particular section allegedly violated. The court held that, in effect, the accused was convicted of an offense with which he was never charged and that this procedure violated the due process clause of the Fourteenth Amendment as much as though the accused had been convicted upon a charge that was never made. The court in In re Oliver[14] declared that, as a minimum, due process requires that an accused be given reasonable notice of the nature of the charge against him.[15]

In addition, the time intervening between the service of the indictment and the arraignment of the accused must be sufficient to permit an intelligent plea and any appropriate motion pertaining to the indictment.[16] Finally, an accused who does not understand English is entitled to a translation of a

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[13] 333 U.S. 196 (1948).
[14] 333 U.S. 257 (1948).
[15] See also In re Murchison, 349 U.S. 133 (1954) where the court took an identical position on similar facts.
[16] Orfield, Criminal Procedures from Arrest to Appeal, p. 277.

copy of the indictment or information.[17]

Right to Counsel

The issue concerning the Constitutional rights of a defendant to counsel, either before or during trial or both, has been litigated before the Supreme Court more than any other single issue involving the due process clause of the Fourteenth Amendment. It is clear that no absolute right to counsel exist Each case must be examined on its merits in determining the issue. Some of the important factors which have been consider pertinent thereto are: the seriousness of the offense charged, the age, experience and mentality of the defendant, the complexity of the issues involved in the trial, whether the defend had expressly requested the assistance of counsel, whether the nature of the charge had been explained to the defendant and whether the defendant was financially able to employ his own counsel. In Uveges v Pennsylvania[18] the defendant was tried f a felony, convicted and sentenced to forty years' imprisonment. He was young and inexperienced. He was not advised of his rig to counsel and no attempt was made to explain to him the effect of his plea of guilty. The court held that he was denied due process. In Powell v Alabama[19] the court held that in a capita case, where the defendant is unable financially to employ couns

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[17] Loui Lung et al v Coleman, 5 Fed Sup 702 (1934).
[18] 335 U.S. 437 (1948).
[19] 287 U.S. 45 (1932).

and is incapable of conducting his own defense because of ignorance, illiteracy or the like, it is the duty of the court, whether or not a request is made, to assign counsel as a requisite of due process. The court in that case further held that such duty would not be discharged by an assignment of counsel at such time and under such circumstances as to preclude the giving of effective aid in the preparation of the case. In Wade v Mayo[20] the court held that where a person charged with crime is by reason of age, ignorance or incapacity unable to properly defend himself the refusal of a state court to appoint counsel at his request is a denial of due process even in the prosecution of a case of a relatively simple nature. In Hawk v Olson[21] the accused was denied counsel during the critical period of his arraignment and the impaneling of the jury. The court held that such denial violated his rights under the Fourteenth Amendment.[22] In Molanson v O'Brien[23] the accused, who was tried for rape and who had ample financial means, was denied the right to employ his own counsel. It was held that under those circumstances the defendant had a Constitutional right to counsel and further to be afforded the services of such counsel in ample time to insure an adequate investigation into the facts of the case, obtain witnesses and prepare a defense.

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[20] 334 U.S. 672 (1948).
[21] 326 U.S. 271 (1945).
[22] See also Smith v O'Grady, 312 U.S. 329 (1941).
[23] 191 Fed 2d 963.

On the other hand, the court in Betts v Brady[24] held that indigent farm laborer, convicted of robbery by a court sitting without a jury, was not denied due process when his request for counsel was refused. The court therein said, "We cannot say that the (Fourteenth) Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." Four justices dissented, asserting that the terms of the Sixth Amendment are incorporated in the Fourteenth Amendment. Similarly, in Bute v Illinois[25] the court held that the defendant in that case had not been denied due process. There the defendant had been tried for allegedly taking indecent liberties with an eight year old child. At his trial he failed to request the assistance of counsel or to declare that he was financially unable to do so. He also pleaded guilty as charged. The court held that the trial court was not bound to initiate inquiries as to the defendant's possible desires for counsel and that he was not entitled to the assistance of counsel on the facts of the case in the absence of a specific request. By way of dictum the court further declared that had the case been capital, the trial court would have been bound to inquire into the defendant's possible desire for counsel and that in the event that such assistance would be desired and the defendant

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[24] note 2, supra.
[25] note 2, supra.

would be unable to pay therefor, to assign counsel for him.[26]

An accused's right to counsel may, under certain circumstances, accrue even prior to the preferral of charges. Thus, in Pikes v Alabama[27] the defendant, an ignorant negro who was suspected of an attempted rape, was held in solitary confinement for one week, during which time he was questioned intermittently by police officials. Among the reasons assigned by the court in holding that the defendant had been denied due process was the fact that a volunteer counsel was denied access to the defendant while in confinement.

Right to a Grand Jury

In a number of decisions the United States Supreme Court has held that the Fourteenth Amendment due process clause does not guarantee a defendant the right to an indictment by a grand jury.[28] Proceedings by information, as a substitute therefor, constitute due process even in connection with prosecutions for felonies.[29]

Double Jeopardy

Strictly speaking, the subject of double jeopardy does not properly belong in the category of possible Constitutional rights

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[26] See Reedy, Civil Rights in the United States, pp. 233-237 and Wood, Due Process of Law, pp. 217-218.

[27] 125 F.W. 1090 (1957).

[28] Hurtado v California, 110 U.S. 516 (1884); Maxwell v Dow, 176 U.S. 581 (1900); Jordan v Massachusetts, 225 U.S. 167 (1911).

[29] Ibid.

which an accused may possess prior to trial. However, any such rights as he may possess by virtue of double jeopardy must be asserted by him prior to his plea. Convenience, if not logic, therefore dictates the advisability of its consideration in the particular portion of the present chapter.

Palko v Connecticut[30] is the leading case on the subject of the rights of an accused, tried by a state court, to assert the plea of double jeopardy in bar of trial. Here the court, for the first time in its history, intimated that a situation could arise where double jeopardy might violate due process. Prior to the Palko case the Supreme Court had ruled upon this question on several occasions, but had consistently held in each case that due process had not been violated and steadfastly refused to consider whether the Fourteenth Amendment embraces any guarantee against double jeopardy. Thus, in Murphy v Massachusetts[31] the court held that where the original conviction of the prisoner was on appeal, construed by the state appellate court to be legally defective and therefore a nullity, a subsequent trial, conviction and sentence of the accused deprived him of no Constitutional rights. Again, in Dreyer v Illinois[32] the court held that a retrial of an accused, after a hung jury, does not subject him to double jeopardy within the meaning of the Fourteenth Amendment.

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[30] note 5, supra.
[31] 177 U.S. 155 (1900).
[32] 187 U.S. 71 (1902).
[33] See also Kepri v Montana, 213 U.S. 135 (1909) and Schoener v Pennsylvania, 207 U.S. 188 (1907).

In the Palko case the state statute in issue authorized the prosecution to appeal any question of law (as opposed to questions of fact) arising out of a criminal prosecution. Pursuant thereto the state did appeal a conviction of second degree murder and sentence to life imprisonment of the defendant, who had been charged with first degree murder. After obtaining a reversal the state prosecuted the defendant a second time for first degree murder. He was thereupon found guilty as charged and sentenced to death. The court held that the statute did not subject the defendant to double jeopardy "so acute and shocking that our polity will not endure it" and that "it (did not) violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

State statutes which provide for more severe punishment for repeat offenders are not repugnant to due process. In Graham v West Virginia[34] the court held that such offenders were "not being punished - - - - - - a second time for the earlier offense, but (that) the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."

There remains for consideration any right of the state to appeal a conviction based upon errors of fact in the trial court. Such appeals, based solely and manifestly upon the mere chance that a second jury might come to conclusions more favorable to

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[34] 224 U.S. 616 (1912).

the prosecution would appear to be contrary to the ingrained American sense of justice. On the other hand, where the jury in the first trial acquits a defendant in the face of such strong evidence of guilt that reasonable persons would conclude the contrary there appears to be no good reason why a retrial would not be consistent with due process.

Ex Post Facto Laws

Ex post facto laws are prohibited by section 10, Article I of the Federal Constitution rather than by the due process clause of the Fourteenth Amendment. The principle that a penal statute may not apply to conduct committed prior to its enactment is closely related to the rules concerning the preciseness of language essential to penal statutes and indictments.

The prohibition against ex post facto laws is directed against legislative action only and not against erroneous and inconsistent decisions by state courts.[35] A statute is ex post facto and hence unconstitutional under a number of circumstances. Thus, conduct engaged in by a person prior to the enactment of a statute may not be made criminal thereby.[36] Punishment may not be increased by statute in order to apply to criminal acts committed prior to the enactment thereof.[37] Rules of evidence

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[35] Frank v Mangum, 237 U.S. 309 (1915).
[36] Ibid.
[37] Lindsey v Washington, 301 U.S. 397 (1937).

may not be changed in order to permit convictions based upon evidence which is less than or materially different from that required at the time the offense was committed if such change curtails the substantial rights of the accused.[38] On the other hand, modes of procedure in criminal trials may be changed, without violating due process, provided that the accused's substantial rights are not thereby adversely affected. Thus, a statute, which changes the place of trial from one county to another, is not ex post facto.[39] Furthermore, statutes which increase the number of appellate judges,[40] or which grant the right of appeal to a state,[41] or change the method of selection of the jurors,[42] or permit a comparison of handwriting experts[43] have been held not to be ex post facto.

State statutes, which provide for increased punishment for new crimes thereafter committed by repeat offenders, are not ex post facto.[44]

Rights of an Accused Accorded by Due Process During Trial

The due process clause of the Fourteenth Amendment guarantees a fair trial to accused persons tried by state criminal courts.

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[38] Ex parte Medley, 134 U.S. 160 (1890).
[39] Duncan v Missouri, 152 U.S. 377 (1894).
[40] Ibid.
[41] Malloy v North Carolina, 181 U.S. 589 (1901).
[42] Gibson v Mississippi, 162 U.S. 565 (1896).
[43] Thompson v Missouri, 171 U.S. 380 (1898).
[44] Gryger v Burke, 334 U.S. 728 (1948).

A fair trial may be said to have been afforded an accused where the proceedings, taken as a whole, do not offend common and fundamental ideas of justice and right. In essence, it is the right to be heard.[45] The right to be heard consists of various facets and attributes, the more important of which are herewith discussed.

Trial by an Impartial Tribunal

Due process requires a court to be both impartial and mentally competent to insure a fair and reasonably full hearing on the merits. This attribute of impartiality is absent where the court is unreasonably influenced by a mob. In Frank v Magnum the court declared that if the jury is intimidated by and the judge yields to the will of a mob so that there is an actual and substantial interference with the course of justice there is a departure from due process. Again, in Moore v Dempsey[47] the court said that if the whole proceedings is a mask and all parts to the trial are "swept to a fatal and an irresistible wave of public passion and - - - - if the state courts fail to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob" is an excuse for such proceedings.

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[45] Wood, Due Process of Law, p. 270.
[46] note 35 supra.
[47] 261 U.S. 86 (1923).

The trial judge must have no substantial and direct pecuniary interest in the outcome of the trial. Tumey v Ohio[48] involved a situation where the trial judge was compensated for his services only when he convicted the defendant. The court held that this fact operated to deprive the defendant of due process. By way of dictum, however, the court indicated that such practice would not be condemned where the costs imposed were so small that they could be ignored under the de minimus doctrine. In Dugan v Ohio[49] the court held that a conviction before a mayor's court did not violate due process where the fixed salary of the mayor was paid out of funds to which fines imposed by him contributed.

Since a tribunal must be substantially free from any pecuniary motives it follows that it must not be prejudiced for any personal reasons such as enmity to the accused or to the group or class to which he belongs.

Right to a Jury Trial

In Missouri v Lewis and in Jordon v Massachusetts[51] the court held that jury trials are not essential to due process and could be dispensed with altogether. However, where a jury is authorized, due process requires that it be impartial.[52]

Literally interpreted, Missouri v Lewis and Jordon v

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[48] 273 U.S. 510 (1927).
[49] 277 U.S. 61 (1928).
[50] 101 U.S. 22 (1880).
[51] note 28 supra.
[52] Brown v New Jersey, 175 U.S. 172 (1899).

Massachusetts would permit a state to try without a jury a per for such serious crimes as murder and rape. This would appear to be a reasonable extension of the court's interpretation of d process in view of the historic reason for the invention of the jury system. The jury as we know it was devised to act as a barrier between the citizens and capricious and intolerable edi imposed by the sovereign. Jurors can and do protect a defendan from such laws so long as they themselves are not in sympathy with them. On the other hand, where the executive branch of th government and the people of the land are in substantial agreement as to the justice of its laws the real need for the jury disappears.

Confrontation. Right to Cross-Examine Adverse Witnesses

A defendant, in a state criminal trial, has no absolute right to be confronted with adverse witnesses. The right exist only to the extent that a denial thereof would unreasonably prejudice his cause. Thus, in Felts v Murphy[53] the court held that due process was not denied a defendant who was totally deaf and had not heard a word of testimony at his trial and the evidence had not been read or otherwise made known to him. However, the defendant in that case did affirmatively authorize ful discretion to his counsel in conducting the trial and made no

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[53] 201 U.S. 123 (1906).

request to ascertain any details of the proceedings. On the other hand, in In re Oliver[54] relief was granted the defendant, who had been denied permission to be confronted with adverse witnesses. There the judge conducted certain proceedings as a one-man grand jury, during which he determined that a witness (the defendant) gave evasive and false testimony solely upon the basis of other previously given evidence. He thereupon summarily found the witness to be in contempt of court and imposed a jail sentence upon him. The court held that these high-handed proceedings violated due process. Among the reasons given for its decision was the total failure of the judge to accord the accused the right to be confronted with adverse witnesses.[55]

The prosecution is permitted to employ depositions against an accused provided, at least, that he was present at their taking and the witness was permanently absent from the jurisdiction.[56] Hearsay evidence is not banned by the Fourteenth Amendment. In Stein v New York[57] the court declared by way of strong dictum that "hearsay evidence, with all its subtleties, anomalies and ramifications," will not be read into the Fourteenth Amendment.

Right to be Present at Trial

Generally speaking, an accused has a Constitutional right

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[54] note 14 supra.
[55] See also In re Murchison, note 15 supra.
[56] West v Louisiana, 194 U.S. 258 (1904).
[57] 346 U.S. 156 (1952).

to be present at his trial, but minor deviations from this rul are permitted. For instance, an accused may properly be denied his request to accompany the jury to the scene of the crime in murder case.[58] A trial judge, who permitted the questioning of a juror in the absence of the accused and his counsel did not violate due process.[59] Nor does the due process clause requi that an accused, convicted of murder, be permitted to cross-examine probation officers as to his previous criminal record when the trial judge considers such information in determining whether to impose life imprisonment or the death sentence upon him.[60] A defendant is not entitled, as a matter of Constitutional right, to be present when the verdict is rendered.[61] In summary, as was declared in Snyder v Massachusetts,[62] "the presence of a defendant (at various stages of his trial) is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence and to that extent onl

Right to Prompt, Speedy and Public Trial

A fair trial presupposes that it is open to the public.[63] The scrutiny of the press and public insures against high-handed practices on the part of the tribunal. However, the right to a public trial is not absolute. Thus, adolescents may be proper

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[58] Snyder v Massachusetts, 291 U.S. 97 (1934).
[59] Howard v Kentucky, 200 U.S. 164 (1906).
[60] Williams v New York, 337 U.S. 241 (1949).
[61] Frank v Mangum, note 35 supra.
[62] note 58 supra.
[63] In re Oliver, note 14 supra; In re Murchison, note 15 su

excluded therefrom where their presence would expose them to immorality and depravity.

The Supreme Court has never had occasion to rule upon the question of whether a state court could conduct in camera proceedings during those portions of a criminal trial where evidence pertaining to confidential matter, the disclosure of which would endanger the security of the nation, is being considered. The Sixth Amendment to the Federal Constitution expressly declares that criminal trials in Federal courts shall be public, but the Supreme court has repeatedly held that this amendment is not incorporated into the Fourteenth.[64] In any particular case the court would perhaps weigh the seriousness of the offense charged against the risk to national security through a disclosure of the evidence. If the offense were serious enough and the risk of public disclosure of the evidence great enough the court might hold that in camera proceedings as to that case would not be repugnant to due process.

Finally, a trial should be conducted with reasonable promptness and speed in view of all the circumstances, including the status of pending cases, but not so accelerated as to deny the accused reasonable opportunity for trial preparation.[65]

Right to Compulsory Process for the Attendance of Witnesses

The United States Supreme Court has never had occasion to

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[64] Wolf v Colorado, note 3 supra.

[65] Cooley, Constitutional Limitations (8th Ed., 1927), pp. 646-648 and cases cited therein.

decide squarely whether the due process clause of the Fourteenth Amendment guarantees a defendant the right to compulsory process for the attendance of witnesses. Dicta in In re Oliver,[66] however, strongly suggests that such is the case. Of course, the right is necessarily limited to those witnesses who are within the limits of the jurisdiction of the court. As in other rights involving due process under the Fourteenth Amendment, it could undoubtedly be asserted only where a denial thereof would be inimical to common standards of right and fairness. In determining this issue in any particular case the United States Supreme Court would doubtless consider such factors as the seriousness of the offense charged, the financial status of the accused, the availability of substitutes, such as depositions and the nature of the evidence to be expected from the witness.

Right to Assistance of an Interpreter

The right of an accused to the assistance of an interpreter, where necessary to an understanding of the nature of the charges preferred against him and for the conduct of his defense seems to be implicit in the due process clause, at least to the extent that a denial thereof would unreasonably prejudice his case. In Loui Lung et al v Coleman[67] the defendants were of Chinese extraction and unable to understand the English language. They had

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[66] note 14 supra.
[67] note 17 supra.

been arrested on charges of murder. Their counsel requested permission to consult with them through an interpreter but were denied the opportunity to do so unless they would consent to the use of an interpreter selected by the arresting authorities. The court held that the due process clause guaranteed an accused the right to consult with counsel through an interpreter of their own choice. "As due process of law means a course of legal proceedings which must proceed according to established procedures and the aid of legal advice, and means of investigating the charges against the accused, it would be a denial of the constitutional rights of one who is held in prison and accused of a crime to refuse counsel an opportunity to talk with him, unless some one else is present who may listen to what is said by the accused to his counsel."[68]

Perhaps a mere failure to assign an interpreter in the absence of a request would not constitute a denial of due process where the non-English speaking defendant affirmatively entrusts full authority and discretion to his counsel in investigating the case and conducting the defense.[69]

Right to Counsel

Due process, generally speaking, entitles a defendant to counsel during trial as well as prior thereto. As in the situation obtaining prior thereto, the right to counsel during trial

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[68] Ibid.
[69] Betts v Murphy, note 53 supra.

is not absolute and, in general, similar rules apply to both situations.[70]

An accused is entitled to the effective assistance of counsel during trial where the circumstances of the case make such assistance essential to a fair hearing. Such factors as the age of the accused, his previous trial experience, his education, the seriousness of the offense charged and the general trial atmosphere bear upon this issue. These criteria add up to the question of whether the defendant was reasonably able to defend himself.

Burden of Proof and Presumption of Innocence

Due process requires the state to assume the burden of proof in a criminal case. However, it is clear that such burden need not constitute proof beyond a reasonable doubt. It is sufficient if the connection between the accused's guilt and the facts proved by the prosecution is rational.[71] In Morrison v California[72] the court declared that "the limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repeal what has been proved - - - - or at least upon the balancing of the convenience and opportunities for knowledge the shifting of the burden will

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[70] See discussion under Right to Counsel Before Trial, pp. 12-15 supra.

[71] Manley v Georgia, 279 U.S. 1 (1929).

[72] 291 U.S. 82 (1934).

be found to aid the accuser without subjecting the accused to hardship or oppression."

Inferences which have been held insufficient to sustain convictions are as follows: fraud on the part of a bank from proof of its inability to pay demand deposits,[73] an intent to defraud an employee of money from proof of breach of a labor contract.[74] In Western and A. R. Co. v Henderson[75] the court held that negligence on the part of a railroad company could not be inferred solely from proof of the occurrence of a collision at a grade crossing.

On the other hand, negligence on the part of a railroad company may properly be inferred from proof of failure to give the prescribed warning.[76] Likewise, the fact that the accused has knowledge of the presence of a distillery apparatus on his premises may be inferred solely from proof of the presence of the apparatus on his premises.[77] Again, prohibited wastage of natural gas may be properly inferred solely from proof of the escape of gas into the air.[78]

In Leland v Oregon[79] the court held that due process does not forbid a state to require a defendant who pleads insanity as

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[73] Manley v Georgia; note 71 supra.
[74] Bailey v Alabama, 219 U.S. 219 (1911).
[75] 279 U.S. 639 (1929).
[76] Atlantic Coast Line R.R. v Ford, 287 U.S. 502 (1933).
[77] Hawes v Georgia, 258 U.S. 1 (1922).
[78] Bandini Petroleum Co. v Superior Ct., 284 U.S. 8 (1931).
[79] 343 U.S. 790 (1952).

a defense to prove the same beyond a reasonable doubt. Again, in Howard v Fleming[80] the court held that due process does not require a trial judge of a state court to give the jury instructions on the presumption of innocence.

Involuntary Confessions and Self-Incrimination

Confessions obtained from an accused under such circumstan as to be shocking to a sense of fairness and decency may not be used against him in a state criminal trial. In Watts v Indiana a confession was obtained after prolonged detention in solitary confinement, without arraignment or advice as to his Constitutional rights and after extended questioning by relays of police officers. The court held that this procedure violated due process. Convictions for murder were reversed on similar groun in Turner v Pennsylvania[82] and in Harris v South Carolina.[83] I Brown v Mississippi[84] the court held that the use of brutality and violence, without more, in obtaining a confession rendered the activities inimical to due process. Furthermore, the Supre Court is not bound by a finding by a state court jury that a confession in a murder trial was voluntary, but determines that

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[80] 191 U.S. 126 (1903).
[81] 338 U.S. 49 (1949).
[82] 338 U.S. 62 (1949).
[83] 338 U.S. 68 (1949).
[84] 297 U.S. 278 (1936).

question from the evidence of record.[85]

In Lyons v Oklahoma[86] the court declared that coerced confessions were repugnant to due process because they offended "basic standards of justice, not because the victim had a legal grievance against the police, but declarations procured by torture are not promises from which a civilized forum will infer guilt." However, where a second confession is obtained by other than coercive means twelve hours after the defendant has made the first under duress, due process is not violated.[87]

The reception in evidence of an involuntary confession in those cases where there is other compelling evidence against the accused would probably not violate due process to the extent of vitiating the conviction. A conviction based upon such total evidence would not appear to conflict with the Supreme Court's sense of ordered liberty.

Unlike involuntary confessions, protection against self-incrimination is not included within the due process clause. In Twining v New Jersey[88] the court declared that immunity from self-incrimination was not to be included as "an immutable principle of justice" or as a "fundamental right." Accordingly, a trial judge in a state court may properly instruct the jury that

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[85] Chambers v Florida, 309 U.S. 227 (1940).
[86] 322 U.S. 596 (1944).
[87] Ibid.
[88] 211 U.S. 78 (1908).

they may draw an inference of guilt from a failure of the defendant to comment upon the state's evidence.[89] In Fikes v Alabama[90] the trial judge had ruled that the defendant in an attempted rape case could not take the stand to testify concerning the voluntariness of his confession without subjecting himself to cross-examination upon the issue of his guilt or innocence. The Supreme Court did not include this ruling in their various reasons for holding that the defendant was denied due process. And in Palko v Connecticut[91] the court observed that many thoughtful students of criminology look upon the immunity as a mischief rather than a benefit. Consistent therewith the court in Adamson v California[92] held that the prosecut could properly comment upon the accused's failure to explain or deny the evidence adduced against him.

The Supreme Court has never had occasion to rule upon the question of whether an accused could be compelled to take the stand, over his objection, for the purpose of testifying against himself although dicta in Snyder v Massachusetts[93] declared that such procedure is appropriate at least in the absence of objecti

Convictions Based Upon Perjured Testimony

A conviction may not stand if it is based upon perjured

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[89] Ibid.
[90] note 27 supra.
[91] note 5 supra.
[92] 332 U.S. 46 (1947).
[93] note 58 supra.

testimony. The Constitutional requirement of due process "cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which, in truth, is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance ---- is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[94]

Searches and Seizures

Unreasonable searches and seizures by state authorities for use in state criminal trials are not proscribed by the due process clause of the Fourteenth Amendment.[95] In fact, extreme measures are tolerated in effecting such searches and seizures. Thus, in Irvine v California[96] state police entered the defendant's dwelling while he was temporarily absent therefrom and installed in a bedroom a microphone which enabled them later to hear incriminating conversation. It was held that due process was not thereby violated. Apparently, however, the Supreme Court's leniency is conditioned partly, at least, upon the supposition that the state does not affirmatively sanction arbitrary police incursions into privacy and that there exists an alert public opinion to act as a restraint upon such activity.[97]

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[94] Mooney v Holohan, 294 U.S. 103 (1935).
[95] National Safe Deposit Co. v Stead, 232 U.S. 58 (1914).
[96] 347 U.S. 128 (1953).
[97] Wolf v Colorado, note 3 supra.

Rights of an Accused Accorded by Due Process Subsequent to Trial

There remains to be considered those rights guaranteed by the due process clause of the Fourteenth Amendment to an accused person which arise subsequent to trial. His possible right to bail is included among these rights although it could as logically be discussed elsewhere. In any event, any right to bail which he may possess would apply equally prior to trial as subsequent thereto.

Cruel and Unusual Punishments

A state retains a wide discretion in prescribing punishment for violations of its local laws.[98] Undoubtedly the United States Supreme Court, in line with the general Constitutional test laid down in the Palko case[99] would not declare a particular sentence repugnant to due process unless it would "subject (the defendant) to a hardship so acute that our polity will not endure it." In the Collins case[100] a sentence to fourteen years imprisonment for perjury was held to be not excessive. In Re Kemmler[101] the court held that the infliction of a death penalty by electrocution is not cruel and unusual within the meaning of the Fourteenth Amendment. By way of dictum, however,

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[98] Collins v Johnson, 237 U.S. 502 (1915).
[99] Note 5 supra.
[100] Note 98 supra.
[101] 136 U.S. 436 (1890).

the court in the latter case declared that the infliction of torture or a lingering death such as burning at the stake, crucifixion, breaking at the wheel and the like would constitute cruel and unusual punishment. The imposition of successively heavier penalties upon repeat offenders does not constitute a cruel and unusual punishment.[102] Finally, a state may subject a person to a second ordeal of electrocution where the first was unsuccessful due to a failure of the equipment.[103]

Right to Appeal

Due process does not accord a defendant any rights as to rehearings, new trials or appeals.[104] "Wide discretion must be left to the states for the manner of adjudicating a claim that a conviction is unconstitutional. A state may decide whether to have direct appeals, - - - - and if so, under what circumstances - - - - and may provide that protection - - - - - be sought through the writ of habeas corpus or corum nobis (or) may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention."[105] In James v Appel[106] the court held that the point at which criminal litigation must cease is best determined by the state itself and that there is no provision in the Federal Constitution which forbids

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[102] Graham v West Virginia, note 24 supra.
[103] Louisiana ex rel Francis v Resweber, 329 U.S. 459 (1947).
[104] McKane v Durston, 153 U.S. 684 (1894).
[105] Carter v Illinois, 329 U.S. 173 (1946).
[106] 192 U.S. 129 (1904).

a state's granting any tribunal the final determination of legal issues.

Right of Access to the Courts and Bail

Due process guarantees a convicted person access to the courts for the purpose of seeking rectification of legal errors committed at his trial. However, the state has the final authority to determine the procedure to be followed and the tribunal to which the application for relief is to be made.[107] A prisoner may not be required to submit legal papers to the prison warden prior to petitioning a Federal court for a writ of habeas corpus.[108] Nor may a prison warden deny a prisoner access to the courts unless he first obtains counsel to represent him.[109]

The due process clause of the Fourteenth Amendment does not require a state to permit a prisoner to furnish bail.[110] On the other hand, where bail is authorized it must not be excessive under all the circumstances of the case.[111]

Conclusion

The due process clause of the Fourteenth Amendment is substantially less sweeping in the protection it affords accused

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[107] Carter v Illinois, note 105 supra.
[108] Ex parte Hull, 312 U.S. 546 (1941).
[109] White v Ragen, 324 U.S. 760 (1945).
[110] McNabb v Durston, note 104 supra.
[111] Ibid.

persons against actions by state governmental agencies than is perhaps generally assumed. None whatever is afforded as to self-incrimination, use of hearsay evidence, unreasonable searches and seizures, trial by jury, bail, indictment by grand jury or appeal to higher state courts. That afforded as to double jeopardy is considerably less than that afforded in Federal courts. Evidence, sufficient to justify conviction of an accused is far less than that quantum thereof essential to convince beyond a reasonable doubt. Perhaps a mere preponderance or only substantial evidence is sufficient. In all other categories of individual rights and freedoms, which the United States Supreme Court has thus far had occasion to comment upon, due process guarantees only that state encroachments thereon shall not be unreasonable in the light of all the circumstances of the case.

It should be emphasized that the Supreme Court's conception of the content of the due process clause appears to be in a state of evolutionary change. During the last decade Justices Black and Douglas and the late Justices Murphy and Rutledge, in certain vigorous dissenting opinions, declared that most if not all of the first eight amendments to the Federal Constitution were incorporated into the Fourteenth Amendment.[112] But Justices Murphy and Rutledge are dead. Of the three new justices, Harlan has already aligned himself with the conservatives on the court.[113]

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[112] Betts v Brady, note 2 supra; Gayes v New York, 332 U.S. 145 (1947).

[113] Fikes v Alabama, note 27 supra.

The Chief Justice probably tends to share the views of Justices Black and Douglas. Accordingly, irrespective of Justice Brennan's philosophy as to civil rights the majority of the present court is still apparently committed to the traditional tests of due process. Be that as it may, the Supreme Court certainly has not committed itself irrevocably to any fixed conception of due process. In Wolf v Colorado[114] the court specifically rejected any such inclination in pointing out that to do so would "ignore the movements of a free society." The main drift of the Court's thinking is undoubtedly towards extending the benefits of due process.

Judicial procedures, other than those familiar to Americans, would not necessarily run afoul of the proscriptions of the due process clause. No one familiar with the laws relating to United States armed forces personnel could seriously contend that they afford fewer rights and safeguards than those implicit in the Fourteenth Amendment. Whether "due process" is denied by the judicial systems of the European members of the North Atlantic Treaty Organization will be examined in the following chapter.

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[114] note 3 supra.

CHAPTER III A CRITICAL STUDY OF LAWS OF FOREIGN COUNTRIES CONCLUDED AS A RESULT OF THE SENATE RESOLUTION

American armed forces are stationed in the majority, if not all, of the North Atlantic Treaty Organization nations. However, the large preponderance of these forces are restricted to those nations whose criminal laws are derived from the code criminel of France. The organic structures of the legal systems of these nations are basically similar, although local conditions and other factors have caused some differences in particular areas.[1] Generally speaking, therefore, any conclusions relating to individual rights and safeguards guaranteed by the criminal laws of any particular such nation are applicable to the others.

Widespread differences of opinion exist as to the relative merits of the common law and the civil law (based upon the criminal code of France) as to their efficacy in affording protection to what are commonly conceived as the basic rights of an accused person. Critics of the civil law maintain that it excessively stresses the power of the state over the individual. Students of the civil law, on the other hand, aver that the common law tends too much to protect the guilty at the expense of the state and stubbornly refuse to concede much, if any, superior merit to the common law. As one French commentator put it, "If I

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[1] Luxembourg Law and the NATO Status of Forces Agreement (a study prepared by Judge Advocate Division, Headquarters, USAREUR 1955) pp. 5-6.

were innocent, I wouldn't care whether I were tried in England or in France; but if I were guilty, I would prefer to be tried in England."[2]

Prior to considering the relative merits of the civil law as compared to American law under the due process clause of the Fourteenth Amendment as they relate to the protection of accused persons in criminal trials it will be profitable to briefly examine the procedures employed by the authorities of civil law nations in prosecuting a defendant for an alleged offense. The procedure, described herewith, is followed in France but, as noted above, substantially similar procedures obtain in all civil law nations.

French Criminal Procedure

An important part of French criminal procedure is the preparatory examination which may, depending upon the circumstances, precede the trial proper. The preparatory examination is obligatory with respect to crimes,[3] is optional with respect to delits[4] and is generally dispensed with entirely in cases involving contraventions.[5] Contraventions are generally referred for trial directly to police courts, called tribunaux simple police.

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[2]Vouin, The Protection of the Accused in French Criminal Procedure, 5 International and Comparative Law Quarterly, 3 (1

[3]Offenses punishable by penal servitude, hard labor, or d

[4]Offenses punishable by fines of variable amounts and imprisonment not to exceed five years.

[5]Minor offenses, punishable by a maximum of ten days imprisonment and a fine not to exceed the equivalent of $75.00.

The Preparatory Examination

The object of the preparatory examination is to determine whether there exists sufficient evidence of guilt to warrant referring the accused to trial.[6] It is conducted by a magistrate called the *juge d'instruction*, who is assisted by a public prosecutor, called a *procureur*.

Most cases are referred to the *juge d'instruction* by the *procureur*, although certain private citizens and organizations also possess this right of referral and occasionally exercise it.

Prior to making any referrals to the *juge d'instruction* the *procureur* is charged with the duty of making an inquiry into the alleged offense. This inquiry may be, and usually is, accomplished by the police. It is followed by the procureur's decision as to whether or not he will press the case further. If the *procureur* decides not to pursue the case further it is closed, unless any victim of the offense commences a civil action against the alleged offender. In this event the victim, in effect, assumes the authority of the *procureur*.

If the *procureur* (or the victim, if there is one) decides to prosecute the case and the case involves a *crime* he must refer it to the *juge d'instruction* for a preparatory examination; if the case involves a *delit* he has the option of referring the

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[6] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 5.

case to the juge or directly to the appropriate tribunal for trial.[7]

Where the procureur (or victim) refers the case to the juge d'instruction the latter proceeds with the preparatory examination. The juge is charged by law to pursue his examination impartially and in the sole interests of justice, which requires an equal verification of the evidence whether offered by the state or the accused. The hearing is essentially inquisitorial in nature since the juge may actively participate in eliciting evidence. All evidence, which is reasonably probative, is admissible for consideration provided only that it was legally obtained. In addition, the juge may, and generally does, make extensive use of any available police files.

Upon opening the preparatory examination the juge's first duty is to verify the identity of the accused. The juge must then advise the accused of the nature of the offense charged against him. He extends to the accused the privilege of making any statement he may desire after advising him that he need not make any. The accused is also accorded the right to be assigned counsel if one is desired. These formalities are mandatory in the preparatory examination except where circumstances justify their omission. They may be omitted when it is necessary to obtain evidence otherwise likely to disappear or when the offend

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[7]Ibid., p. 9.

is apprehended in the very act of the commission of the offense by the police.[8]

The juge is obligated to prepare a written record of the proceedings of the preparatory examination. This record is called a process verbal. It is admissible against the accused in any criminal trial to which he may be referred. If regularly prepared its probative value is high. Before a tribunal simple police or a tribunal correctionnel a regularly prepared process verbal constitutes authentic proof of its contents until the contrary is proven. However, if it contains material irregularities its probative value before such courts is considerably reduced and may no longer constitute prima facie evidence of guilt. When used before a court of assize a process verbal, even though regularly prepared, is assigned only that evidentiary weight considered proper by the judges and jurors,[9] and may, in no event, constitute of itself, prima facie evidence of guilt.

Upon the completion of the preparatory examination the juge d'instruction decides whether to dismiss the case or to refer it further for trial. Any decision to dismiss the case is final. If he decides that the case merits prosecution and the offense constitutes only a delit he most generally refers

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[8] Wright, French Criminal Procedure, 45 Law Quarterly Review, 337.

[9] Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement (a study prepared by the Office of the Staff Judge Advocate, Headquarters, USAREUR Communication Zone, APO 58, U.S. Army) pp. 13-16; Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, pp. 48-50.

it directly to a court called a tribunal correctionnel (though he may conceivably refer it to a tribunal simple police). If an offense involves a crime and he decides that it merits prosecution he must refer it to a certain board of officials for a second preparatory examination. This board is called the chambre des mises en accusation. In theory, at least, its purpose is to doubly insure the likelihood of the accused's guilt prior to referring him to formal trial. The chambre conducts its examination in secret. It is strictly inquisitorial in nature and is surrounded by none of those safeguards implicit in the examination conducted by the juge d'instruction.[10] Upon its completion of the proceedings the chambre determines whether to dismiss the charges or to prosecute them. If it dismisses the case, its action is final. On the other hand, if it decides that the charges should be prosecuted, it refers them to the court of assize.

Thus, an accused may eventually be tried by either a tribunal simple police, a tribunal correctionnel or a court of assize, depending upon the seriousness of the offense and to some extent, the discretion of the procureur. A brief description of these three types of French criminal courts follows.

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[10] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 22.

Tribunal Simple Police

Tribunaux simple police are informal criminal courts with limited jurisdiction. They may be likened to justice of the peace courts in the United States.[11]

Tribunal Correctionnel

The tribunaux correctionnels, like the tribunaux simple police, are informal courts. The proceedings start with the examination of the accused. The evidence is then heard or, more often than not, simply read from the witness' prepared statements. Witnesses need not attend in person. The accused, however, must appear in person unless the case involved is of a minor nature or unless the accused has departed from the country. The prosecutor and the accused may present arguments to the court and the accused is permitted the final argument. The court may render its judgment immediately or may reserve it for some later sitting. Appeals lie to a superior court called the chambre of appeals.[12]

Court of Assize

The court of assize is a special criminal forum. It consists of three judges and seven jurors. One of these judges acts as

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[11] Wright, French Criminal Procedure, note 8 supra, p. 92.
[12] Ibid.

the president of the courts. He exercises considerable control over the proceedings, having the power "to reject anything which would tend to prolong the proceedings without the hope of more certainty in the results."[13] The proceedings are inquisitorial in nature. "And above all and independently of the evidence and argument presented by the parties he must make a personal effort of his own to clarify all the circumstances of the crime in order to lead the court to the discovery of the truth."[14] The role of the two assistant judges is comparatively minor. The guilt or innocence of the accused and any appropriate sentence are determined by a majority vote of the three judges and the seven jurors acting as a unit.

An official of the court of assize, called the procureur, is charged with certain pre-trial functions. He draws up the charges, serves the charges on the accused, advises the accused of the identity of any adverse witnesses which will be called to testify and insures the presence of the accused at the trial.

At the trial proper the charges are first read by a clerk of the court. The president thereupon launches into an examination of the accused. The scope of this examination is unlimited and may encompass the entire history of the accused, so long as the questions relate to matters relevant either to his guilt or

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[13] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 160.

[14] Ibid.

innocence of the crime charged or to an appropriate sentence in the event of his conviction. After the examination of the accused witnesses are called for questioning. These must be heard in person their evidence may not be given by a mere reading of their prepared statements as is the case before a tribunal correctionnel. Witnesses are permitted to speak freely and may not be interrupted by either side. As a result almost no restraints upon relevancy of evidence may be imposed upon them. After the direct testimony of the witness, questions may be put to them by the president or through him by the parties to the trial or by the members of the jury.

After the evidence has been taken the court hears arguments by the parties. The accused is always permitted the closing argument. Finally, the court deliberates upon the guilt or innocence of the accused and any sentence, if appropriate. A bare majority of the judges and jurors is sufficient to convict or to decide the sentence.

From the foregoing brief discussion it is apparent that French criminal trial procedure (and therefore that of other civil law nations) places substantially more importance upon pre-trial formal investigations and correspondingly less importance upon trials themselves, than is true in the United States. Any fair comparison of the two systems of criminal justice as they pertain to the rights and safeguards of accused persons must, therefore, include those implicit in the preparatory examination.

The remarks which follow include reference to the preparatory examination when appropriate. For convenience, those rights and safeguards afforded defendants by the criminal procedures of civil law nations will be considered in the same order as they were considered in the preceding chapter.

Rights of Accused Persons Before Trial in Civil Law Nations

Pre-trial rights accorded accused persons under the civil law are, in general, approximately equivalent to those implicit in the due process clause of the Fourteenth Amendment to the Federal Constitution.

Intelligibility of Penal Statutes

Penal statutes in civil law nations must conform to substantially the same standards of clarity of language as state criminal statutes in the United States. The Declaration and the Rights of Man and the Citizen of 1789 forms the basis for the criminal procedures of all civil law nations. Paragraph 8 of the Declaration provides as follows: "No man may be accused, arrested or detained except in the cases and according to the procedure described by law." Under this organic document offenses must be based upon some specific and positive provision of law.[15]

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[15] Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, pp. 4-8.

Certainty of Charges

The civil law affords ample protection to accused persons in apprising them of the nature of criminal charges preferred against them. At the time he is served with a summons to appear in court the accused is served with written charges. These charges must include reference to the specific law allegedly violated. In those cases referred for investigation at a preparatory examination the juge d'instruction is charged by law with fully advising the accused at the outset of the examination of the nature of the offense or offenses he is suspected of having committed. At the completion of the preparatory examination written charges must be preferred against the accused if the juge decides to further prosecute him. In addition, continuances are granted as a matter of right if necessary for the accused to prepare his defense.[16]

Right to Counsel

The accused is entitled as a matter of right to the assistance of counsel at the preparatory examination. However, the effectiveness of counsel is severely restricted in that adverse witnesses may be examined out of the presence of the accused or his counsel. Counsel may be present as a matter of right at the preparatory examination only when the accused is being examined. Even then he cannot, as a matter of right, put questions directly

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[16] Ibid., pp. 809.

to the witness. The juge d'instruction may restrict him to the right to merely assert that certain questions put to the witness by the juge are improper and request him to take such steps as may be necessary to ascertain the truth. Failure of the juge to take appropriate action after such protests may render the proceedings irregular so as to adversely affect the probative value of the resulting process verbal.[17]

Since the process verbal is of potentially critical importance at any subsequent trial the preparatory examination is, in a very real sense, part of the trial proper. Unavailability of assistance of counsel, as he is employed in the United States could, at the preparatory examination, therefore, harm an accused's case. On the other hand, similar conclusions could be made with respect to equivalent denials in American courts and due process would not necessarily be violated.

Right to Grand Jury

The criminal procedures of civil law nations make no provisions for grand juries, as such.[18] The preparatory examinatio conducted by the juge d'instruction, is mandatory as to all types of crimes, as distinguished from delits and contraventions and constitutes an effective substitute therefor.

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[17] Ibid., pp. 71-72.

[18] Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, p. 29.

Double Jeopardy

The civil law does not proscribe double jeopardy except under certain circumstances. Either the government or the accused may appeal from decisions of tribunaux correctionnels and tribunaux simple police on either law or fact. Upon any retrial of the case as the result of such appeal the new tribunal is not limited in its sentence by any sentence imposed by the former tribunal. In courts of assize either party may appeal but only as to errors of law.[19]

Ex Post Facto Laws

The Declaration and the Rights of Man and the Citizens of 1789 expressly provides that "No man can be punished except by a pre-existing law." Civil law criminal codes express the same idea in substantially the same language. The French Code expresses it in the following words: "No petty offense, no misdemeanor, no felony can be punished with penalties that were not definitely the law before the offenses were committed." However, six exceptions to the rule are normally permitted.

Interpretive law constitutes one such exception. These laws are considered to be integral parts of the laws to which they refer and are retroactive to the time of the enactment of the laws

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[19]Ibid., pp. 32-33.

which they interpret.

A law which ameliorates the method of executing sentences may relate back, in point of time, to the law affected thereby.

A third such exception is made to laws which deal with measures of state security.

Laws which are less severe than those replaced may be made retroactive to the effective dates of the laws replaced. This is perhaps the most important exception to the general rule, in point of frequency of occurrence. Certain problems may arise with respect to this exception in determining which is the less severe law and the application of the less severe of the laws.

Laws which modify the formalities of legal procedure constitute still another exception to the general rule. This type of law cannot, however, retroactively alter an accused's right to be tried by certain courts nor may they adversely affect the substantial rights of the accused.

Finally, statutes of limitations may operate retroactively, provided that the law to which the former and shorter statute of limitations applied has been replaced by a law which is less severe and which relates to the later and longer statute of limitations.[20]

Rights of an Accused During Trial in Civil Law Nations

Specific rights and safeguards accorded accused persons

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[20] Ibid., pp.5-8.

during trial by civil law nations may be more or less substantial than corresponding rights and safeguards guaranteed accused in state courts in the United States. Perhaps the greatest weaknesses exist in civil law notions of witness confrontation and cross-examination. On the other hand, much time is devoted to the preparatory examination in serious offenses which, when conducted fairly and impartially, tends to increase the procedural safeguards afforded accused.

Trial by Impartial Tribunal

Civil law procedures afford reasonable assurance of the competence and impartiality of those authorities responsible for formal investigations and trials of accused persons.

The juge d'instruction, who is the magistrate in control of the preparatory examination, is charged by law to inquire impartially into the facts of cases brought before him. As a practical matter, however, the competence and fairness of his report (the process verbal) depend to a marked degree upon his personal character. In France, at least, he is directly responsible to the Minister of Justice and receives his appointments from him for periods of three years each. He occupies a rather low position in the French judicial hierarchy and is not well paid. His dependence upon the Minister for advancement and other benefits, therefore, is obvious and so he may be vulnerable to undue influence upon the latter's part. In addition, the juge

may, and often does, make use of a so-called "delegated examination" whereby he shifts the main burden of his examination to the police. This practice may well cause his attitude to be overly influenced by the opinions of the police.[21]

Procedural safeguards, pertaining to tribunals, provide more assurance for the impartiality and competence of judges and jurors. The accused may challenge the judges and jurors for cause on a number of grounds and he may peremptorily challenge four jurors.[22]

Right to Jury Trial

Juries are employed in criminal proceedings of civil law nations only in the courts of assize, which have exclusive jurisdiction over crimes or felonies. Jurors are drawn by lot until seven are selected. Those selected must meet certain minimum statutory requirements. Ample opportunity for challenging any juror for cause is afforded the accused. The function of the jury is limited to assist in deciding the guilt or innocence of the accused and any sentence, when appropriate. The three judges vote with the jurors on these issues and a majority of six judges and jurors, in any combination, is decisive.[23]

Confrontation. Right to Cross-Examine Adverse Witnesses

There exists no right on the part of the accused to be confronted with adverse witnesses in either the preparatory

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[21]Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 15.

[22]Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, p. 9.

[23]Ibid., pp. 31-32.

examination, the tribunal simple police, or the tribunal correctionnel. The juge d'instruction and the two above named courts do, however, have discretionary authority to permit such confrontation.[24] It is entirely possible, therefore, for an accused to be convicted of a contravention or a delit without ever having seen a witness.

On the other hand, witnesses must be heard in person before courts of assize. Their evidence may not be given there by a mere reading of their prepared statements.[25] However, the right and opportunity to cross-examine adverse witnesses are practically non-existant even in the court of assize. "- - - - the art of cross-examination, if it exists at all in France, has but a spark of life. No one seems to know how to dissect a statement into its component parts, find out hidden contradictions and cut through equivocations, generalizations or hearsay to the essence of the facts within the witness' own knowledge."[26] To add to this serious handicap of lack of skill on the part of counsel in civil law courts, all questions must be put to the witness through the president of the court.

Right to be Present at Trial

Civil law procedures differ in certain aspects from those of

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[24] Ibid., p. 24.
[25] Wright, French Criminal Procedure, 8 supra, p. 100.
[26] Ibid., p. 99.

the common law with respect to the requirements for the accused presence at his trial. The jurisdiction of the criminal court, under the civil law, is not dependent upon personal service of process on the accused. An accused is, at most, afforded an opportunity to be present at his trial if he so desires. If he fails to appear in court, having been extended an opportunity to do so, he may be arraigned, tried and sentenced in absentia. Thus, where an accused has departed from the territory of a civil law nation, criminal jurisdiction may be acquired over him through service of process by mail, addressed to his latest known address. Obviously, the execution of any sentence to imprisonment must await his return to the country. However, fines may be collected by levying execution upon any property which the accused may have situated in the country.

In addition to the possibility of collecting fines from an accused, certain other reasons have been assigned for permitting trials in absentia in civil law nations. "- - - - (1) There is a vindication of national pride, in that it is possible to have final adjudication of every penal offense against the law of the country. (2) It means that there is a final disposition of all pending cases, so that the files in the office of the local prosecutor can be closed. (3) It presents a very effective

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[27]Snee and Pye, A Report on the Factual Operation of Article VII of the Status of Forces Agreement (Georgetown Univ. Law Center), p. 66 (1956).

means, without the necessity of denying a visa or refusing admission, of keeping undesired persons out of the country. - - - (4) Finally, through a joinder of criminal and civil actions, such a judgment on the criminal side of the court enables an injured civil party to have its damages assessed in the civil action and to recover from any insurance company to the extent of liability."[28]

But even in those cases where an accused appears at his trial his right to remain present during all stages thereof is not absolute. A court is empowered to order his removal from the court room while a witness is being interrogated provided that his physical presence would interfere with ascertaining th truth from the particular witness.[29]

Right to Prompt, Speedy and Public Trial

In general the accused has the right to a public trial in civil law countries. However, tribunals do possess discretionary power to order closed hearings where open hearings would likely result in injury to public order and morals. Closed hearings may never be ordered in the sole interests of the parties to the trial. In camera proceedings are the exception to the rule. Abuse of discretion in closing a court to the public will render

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[28] Ibid., p. 66.

[29] Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, p. 225.

the proceedings a nullity.[30]

However, it must be kept in mind that an important part of the prosecution's case may consist of the *process verbal* prepared by the *juge d'instruction* as the result of the preparatory examination. Much, if not all, of the evidence accepted by the *juge* may have been obtained from witnesses who gave their testimony out of the presence of the accused, his counsel or the publ No one has the right to be present at the preparatory examinatio when witnesses are being examined. At most, the *juge* is obliged to make all documents in his file available to the accused twent four hours prior to each questioning of the accused.[31] By conducting his examination of the accused prior to examining the witnesses the *juge* can deprive an accused even of this limited right.

On the other hand, there is no positive assurance that a criminal trial will be either promptly begun or speedily concluded. No positive law exists which compels trials to be conducted within minimum time limits. Certain provisions of law, however, do tend to accelerate certain portions of the criminal proceedings. Thus, the court of assize must insure that the accused is interrogated within twenty four hours after the receipt of the *process verbal* by the clerk of court. At the preparatory examination the *juge d'instruction* must interrogate

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[30] Ibid., pp. 93-94.

[31] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 17.

the accused within twenty four hours after any arrest of the accused. Furthermore, it is in the interest of the juge d'instruction to conduct a prompt and speedy investigation to insure that the evidence does not become stale. In spite of the foregoing considerations, however, investigations and trials of serious or complicated offenses are apt to be dilatory in civil law nations.[32]

Right to Compulsory Process for the Attendance of Witnesses

The civil law includes ample provisions for insuring the presence of witnesses in criminal trials. In general, an accused may cause as many witnesses as he may desire to be summoned, subject only to the condition that he notify the public prosecutor of their identity twenty four hours prior to trial.[33]

Right to Counsel

The civil law unconditionally assures the assignment of counsel to the accused in all cases where one is expressly requested and, in certain cases, even where none is desired. Thus, in trials before tribunaux simple police and tribunaux correctionnels the option is left to the accused. If he requests

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[32] Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, pp. 17-18.

[33] Ibid., p. 22. See also Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, pp. 176-177.

counsel one will be furnished him; if he declares that none is desired he may proceed with his defense without one. On the ot hand, counsel is furnished accused who are tried by courts of assize, irrespective of their expressed desires.[34]

Right to Assistance of an Interpreter

An interpreter is furnished, as a matter of right, to accused who are unfamiliar with the native language, in trials by courts of assize. Similarly the juge d'instruction is obliged appoint an interpreter where necessary in the preparatory exami tion. However, no similar rights are conferred by tribunaux simple police or tribunaux correctionnels.[35]

Burden of Proof and Presumption of Innocence

Any discussion concerning the burden of proof and any presumption of innocence inherent in the criminal procedures of civil law nations must take into account the preparatory examin tion, since the process verbal, prepared by the juge d'instruct may, of itself in certain cases, constitute prima facie evidenc of the guilt of the accused.

In the preparatory examination the juge d'instruction may not recommend an accused for trial unless he is persuaded of th

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[34] Ibid., pp. 16-17. See also Wright, French Criminal Procedure, note 8 supra, p. 92.

[35] Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, pp. 16-17; Wright, French Criminal Procedure, note 8 supra, p. 92.

accused's guilt to the extent of an intime conviction, which signifies a "profound personal conviction" of guilt.[36] The same rule applies to the trial itself. Basic to French jurisprudence is the doctrine that doubts are resolved in favor of the accused.[37]

Consistent with placing the burden of proof on the prosecution, the civil law presumes that the accused is innocent until the contrary is proven. "- - - - the whole system of French criminal procedure is based, as in England, on the presumed innocence of the accused. The principle is categorically laid down in the famous Declaration of the Rights of Man of 1789."[38] Once a prima facie case has been established, however, any failure of the accused to rebut or explain the evidence may operate to strengthen the credibility of that evidence. However, "the silence of the prosecution. - - - - - - the failure of the accused to speak for himself or to bring witnesses on his own behalf (may, but need not cause the court to) infer that he has no evidence to rebut the already sufficient evidence made out by the prosecution."[39]

Involuntary Confessions. Self-Incrimination

All confessions, irrespective of their voluntary or involuntary nature, are admissible against the accused in criminal

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[36] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 15.

[37] Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, p. 19.

[38] Wright, French Criminal Procedure, note 8 supra, p. 324.

[39] Snee and Pye, A Report of the Actual Operation of Article VII of the Status of Forces Agreement, note 27 supra, pp. 61-62.

courts of civil law nations. The circumstances under which a confession was obtained merely affect the evidentiary weight which may be assigned to it. The court will accord the confession such probative weight as it considers proper and may legally convict an accused upon the basis of his confession alone, provided of course, that the court is thereby persuaded of the accused's guilt "by a profound personal conviction." The accused may repudiate or disavow his confession for any reason and such action on his part will be considered in assessing its weight.[40]

On the other hand, no accused may be compelled to incriminate himself either before the juge d'instruction or a criminal court. "The guarantee against compulsory self-incrimination which is found in the Fifth Amendment to the United States Constitution is not the subject of any express provision of the French system of penal procedure. In effect, however, the accused, under French jurisprudence, enjoys a right which, if anything, is even broader than the American guarantee against self-incrimination. He has no obligation to make a statement or to answer questions at any stage of the proceedings, and he need give no reason for his silence. Indeed, at the preliminary examination the law imposes upon the juge d'instruction the positive duty to

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[40] Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, p. 26.

inform him that he has the right to remain silent and a failur to inform him of this right renders all remaining proceedings before the judd null and void.[41]

Searches and Seizures

The juge d'instruction, the procureur and certain other civilian authorities are authorized by law to conduct searches and seizures in connection with the investigation of alleged offenses. Such searches and seizures are authorized only where the nature of the alleged offense is such that a search will likely produce relevant evidence. In general, searches may be conducted only in the presence of the accused. They may not be made at night. Places which may be searched include the accused's domicile and place of business.[42] Fruits of an illegal search are not admissible into evidence.[43]

Convictions Based upon Perjured Evidence

Convictions allegedly based upon perjured testimony may be appealed to higher courts. The mere assertion of perjured testimony is sufficient to suspend the execution of the decision of the court. If the witness whose testimony is questioned is subsequently tried and convicted of perjury the case is remanded

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[41]Snee and Pye, A Report on the Actual Operation of Article VII of the Status of Forces Agreement, note 7 supra, p. 64.

[42]Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, p. 29.

[43]Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, p. 74.

for a new trial and the convicted perjurer is not competent to testify at the new trial. On the other hand, if the alleged perjury is not established the lower court's decision will be ordered into execution.[44]

Cruel and Unusual Punishments

A variety of punishments is authorized by the civil law to be imposed upon persons convicted of crime. The severity of the punishment in a particular case is generally proportionate to the gravity of the offense found proved. Specific kinds of punishment authorized by the civil law are as follows: death by decapitation, hard labor for life, hard labor for a period of time, imprisonment for life, imprisonment for a period of time, solitary confinement with hard labor for a period of time, fines, deportation, exile and loss of civil rights.[45]

It is conceivable that a sentence imposed upon an accused person would be cruel and unusual by American standards if such sentence did not properly take into account the nature of the offense found proved, the age and maturity of the accused and the like, or if he were denied religious or similar counsel or if the prison facilities were below those minimum standards of comfort and sanitation considered essential by Americans. As a practical

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[44] Ibid., p. 152.

[45] Basic Guarantees in Criminal Trials in France under the Status of Forces Agreement, note 9 supra, p. 27.

matter, however, punishment imposed by criminal courts of civil law nations, in the large majority of cases, are not so excessi as to offend the due process test.[46]

Right to Appeal

Provisions for appeal are included in the criminal procedures of all civil law nations. Decisions of the juge d'instruction are appealable on questions of law and fact to the chambre des mises en accusation. Decisions of tribunaux simple police may be appealed on questions of law and fact to tribunaux correctionnels and decisions of tribunaux correctionnels to the chambre des appels correctionnels de la cour d'appel. Decisions of the courts of assize may be appealed only on questions of law and to the cour de cassation.[47] An appeal from an imposition of preventive detention by the juge d'instruction may be made to the chambre des mises en accusation.[48]

Bail and Preventive Detention

Civil law nations permit an accused to furnish bail under certain limited circumstances. It is granted as a matter of right in cases of contraventions.[49] Again, if the offense is

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[46] Ibid., p. 27; Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, pp. 246-247.

[47] Basic Guarantees in Criminal Actions in France under the Status of Forces Agreement, note 9 supra, p. 34.

[48] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 20.

[49] Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, p. 190.

a delit for which the maximum penalty is imprisonment for two years it is granted as a matter of right in France, but only if the accused has a previous clear record and is domiciled in France.[50] In more serious offenses it is granted only at the discretion of the court.[51] Where bail is granted the court will normally require a monetary amount sufficient to cover the claim of any civil party, court costs and the amount of any fine that may be adjudged.[52]

The juge d'instruction has the authority to order an accused to be held in preventive detention in those instances where bail is not obtainable as a matter of right and where he considers such measures necessary to prevent the accused from taking flight, destroying evidence or corrupting witnesses, or to satisfy public opinion in cases involving heinous crimes or to protect the accused from the fury of a mob. Preventive detention may be continuous up to the day of the trial. In case of conviction the period encompassed by the preventive detention is deducted from any sentence of confinement and living conditions incident to preventive detention are superior to those imposed as the result of a sentence to imprisonment. Nevertheless, genuine hardship can result from an order imposing preventive detention

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[50] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 20.

[51] Luxembourg Law and the NATO Status of Forces Agreement, note 1 supra, p. 190.

[52] Ibid.

and the time elapsing between the preparatory examination and the trial can be very long.[53]

Conclusion

Protection afforded accused persons by the criminal procedures of civil law nations substantially equals that afforded by the due process clause of the Fourteenth Amendment in a number of specific areas. Included therein are the following: (a) a proscription against vague and uncertain penal statutes, (b) an assurance that the charges preferred against an accused shall be alleged in clear, precise and unambiguous terms, (c) a proscription against ex post facto laws, (d) a guarantee that trials shall be conducted by reasonably competent and impartial tribunals, (e) compulsory process for the attendance of witnesses, (f) a prohibition against convictions based on perjured testimony, and (g) a ban against the imposition of cruel and unusual punishments. In other specific areas of protection civil law procedures afford substantially more protection to accused persons than that afforded by the due process clause. These areas include: (a) a limited right to trials by jury, (b) limited rights to bail, (c) rights to appeal to higher tribunals, (d) a proscription against self-incrimination, and (e) a prohibition against illeg-

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[53] Vouin, The Protection of the Accused in French Criminal Procedure, note 2 supra, p. 20.

searches and seizures.

In a number of other areas of specific safeguards appropria to accused persons the Fourteenth Amendment due process clause appears to afford measurably more protection than that afforded accused by the civil law.

In the first place, due process probably prohibits any re-trial of a person based upon errors of fact unless the trial court abused its discretion in assessing the facts while arrivin at its verdict. The civil law, on the other hand, permits the state to appeal from any decisions of tribunaux simple police o tribunaux correctionnels.

Secondly, accused persons in American state courts are accorded substantial rights with respect to confrontation with and cross-examination of adverse witnesses, whereas these rights are extremely limited or virtually non-existant under the civil law. The process verbal may constitute the prosecution's entire case before tribunaux simple police and tribunaux correctionnels. At the preparatory examination, from which the process verbaux originate, witnesses may be examined by the juge d'instruction out of the presence of the accused. The fact that the accused h limited access to the process verbal or the mere likelihood that the juge d'instruction may be skilled in conducting investigations or may be disposed to be fair and impartial is hardly a f substitute for confrontation with and vigorous cross-examinatio of adverse witnesses.

Again, an accused has an almost unrestricted right to be present during the entire course of his trial in American state criminal courts. Those deviations condoned by the due process clause are of only minor importance. On the other hand, this right may be largely denied an accused in trials before tribunaux simple police and tribunaux correctionnels. As noted above, the juge d'instruction may deny an accused the right to be present at the preparatory examination while witnesses are being interrogated and those witnesses need not appear in person before the above named courts in order for their testimony to be received into evidence. The accused fares considerably better in this respect in trials before courts of assize, however, since witnesses must give their testimony in person before that court.

Prompt, speedy and public trials are, with minor deviations, guaranteed an accused by the due process clause. No such assurance is conferred by the criminal procedures of civil law nations. While it is true that trials proper in civil law nations are substantially as open to the public as in state courts of the United States, the preparatory examination may be conducted in secret. Exclusion of the public from the preparatory examination can operate as a genuine hardship to the accused, especially in those cases where the process verbal constitutes all or the major part of the prosecution's case. Dilatory practices in initiating and conducting trials in civil law nations also tend to harrass and annoy accused persons.

The civil law, in general, makes provision for the assista of interpreters only in courts of assize and preparatory exami tions. No such rights are accorded accused who are tried by tribunaux simple police or tribunaux correctionnels. Due proc on the other hand, assures to an accused the assistance of an interpreter whenever necessary for his defense, at least in those cases where one is requested.

A fair comparison of those rights to counsel guaranteed by the Fourteenth Amendment with similar rights afforded an accuse by the civil law is somewhat difficult to make. Unquestionably the civil law affords him considerably more protection in this respect insofar as trials are concerned. However, as noted above, unless permitted to do so by the juge d'instruction, an accused's counsel may not be present at the preparatory examina- tion when witnesses are being examined. In such cases his valu to the accused is necessarily limited to giving him such advic as he can from examining the process verbal. In those cases wi the process verbal constitutes the main part of the prosecution' case the civil law probably affords less protection by way of as sistance of counsel than is implicit in the due process clause. In other cases the civil law is perhaps equal or somewhat superior to those minimum standards required by due process.

The rules pertaining to the burden of proof and presumptio of innocence are substantially the same under the due process clause and as understood by the civil law. However, the opinio

of the juge d'instruction, in matters relating to contraventions and delits, in those cases where they are investigated by him, may be decisive as to those issues. The reason therefor, again, is that the process verbal, prepared by him, constitutes prima facie evidence of guilt in those cases tried by tribunaux simple police and tribunaux correctionnels. Any protection afforded the accused by these rules, therefore, may largely depend upon the character and wisdom of the juge.

Involuntary confessions are totally inadmissible in American state criminal courts. On the other hand, any duress or coercion used in obtaining them affect only their credibility in the criminal courts of civil law nations. Be that as it may, it may be doubted that any real differences exist in the practical application of the two rules since the criminal courts of civil law nations are largely or exclusively controlled by judges as opposed to jurors.

Lastly, the practice of keeping an accused in preventive detention may offend due process where such detention is imposed for unreasonably long periods of time, under unreasonably severe conditions or where the facts of the case do not justify its imposition.

The most serious deficiencies of the civil law nations, as measured by due process, derive from the extensive use of and heavy reliance upon the preparatory examination. A public trial before a tribunal correctionnel or a right to counsel before that court can hardly rectify any prejudicial action taken by the juge

d'instruction in denying the accused the right to be confronted with or to cross-examine adverse witnesses at the preparatory examination. Similarly, such a trial cannot erase the effects of any abuse of the juge's discretion in assessing the evidence against the accused or engaging in any other high-handed practic such as corrupting witnesses. Careful and critical scrutiny of the moral character and ability of the juge is of vital import therefore, in determining whether the "Constitutional rights" o an accused have been violated as the result of the operation of the criminal procedures invoked against him by the authorities of the civil law nations.

CHAPTER IV RIGHTS AND SAFEGUARDS CREATED BY THE STATUS OF FORCES AGREEMENT

Paragraph 2 of Article VII of the Status of Forces Agreement[1] provides that the receiving state[2] shall have exclusive jurisdiction over members of the military forces of the United States, civilian components thereof and dependents of such members in respect to those offenses committed by any such person in the receiving state, which are punishable by the laws of the receiving state but not punishable by the laws of the United States. That paragraph further provides that the receiving state shall have the primary right to exercise jurisdiction over all such personnel for all criminal offenses committed by such persons in the receiving state provided that such offenses are not (a) offenses solely against the security or property of the United States, (b) offenses solely against another member of such United States military force, civilian component thereof or dependent, or (c) offenses arising out of any act or omission in the performance of duty.

Paragraph 3 (c) of Article VII of the Agreement provides that the authorities of the receiving state shall give sympathetic consideration to any request from United States authorities for a waiver of its rights in those cases where the United States authorities consider such waiver to be of particular importance.

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[1] See Appendix B

[2] A receiving state is any NATO nation in which United States troops are stationed.

This paragraph does not limit such sympathetic consideration to those offenses over which the receiving state has the primary right of jurisdiction. It extends equally to those offenses over which that state has exclusive jurisdiction.

A number of safeguards were incorporated into the treaty with the manifest object of increasing protection to United States military personnel who might be prosecuted by the criminal laws of the receiving states. Paragraph 9 of Article VII of the treaty provides that these specific safeguards shall consist of the following: (a) a prompt and speedy trial, (b) a right to be informed, in advance of trial, of the specific charges preferred against an accused United States military person, (c) a right to be confronted with any witnesses against him, (d) a right to have compulsory process for the attendance of witnesses, if they are within the jurisdiction of the receiving state, (e) a right to have counsel of such person's own choice for his defense or to have free and assisted counsel under the conditions prevailing for the time being in the receiving state, (f) if considered necessary, the right to have the assistance of a competent interpreter, and (g) the right to communicate with a representative of the United States Government and, when the rules of the court of the receiving state permit, to have such representative present at his trial. In addition, paragraph 8 of Article VII of the treaty provides for limited rights pertaining to double jeopardy.

Deficiencies inherent in a number of specific rights and

safeguards afforded by the criminal procedures of the civil law, as measured by due process, were rectified in full by those provisions in the Status of Forces Agreement. Others were rectified in part. A few were wholly unaffected by any of these provisions in the treaty. Finally, one provision of the treaty created a right which is implied neither in the due process clause of the Fourteenth Amendment nor in the civil law.

Deficiencies in the Civil Law Rectified by SOFA

Those deficiencies in rights and safeguards afforded by the civil law and which were wholly rectified by the Status of Forces Agreement are as follows: (a) the right to a prompt and speedy trial as assured by the provisions of paragraph 9 (a) of Article VII thereof, (b) the right to be confronted with adverse witnesses, as assured in paragraph 9 (c) of Article VII thereof, and (c) the right to the assistance of interpreters, as assured in paragraph 9(f) of Article VII thereof.

Deficiencies in the Civil Law Rectified in Part by SOFA

Deficiencies in the civil law relating to double jeopardy, the right of an accused to be present at his trial and his right to counsel were rectified only in part by the Status of Forces Agreement.

Paragraph 8 of Article VII of the treaty provides, in part, that when the military authorities of the United States have

tried an accused by a court martial and such court has acquitted him or, having convicted him, the accused is serving or has served his sentence, the authorities of the receiving state may not try him again for the same offense. However, nothing in this paragraph or elsewhere in the treaty prohibits the authorities of the receiving state from retrying in their own courts a member of the United States armed forces who has previously been tried in their own courts.

Paragraph 9(c) of Article VII of the treaty accords the accused the right to be confronted with witnesses against him. Necessarily implied in this provision, of course, is the right to be present at his trial during those times when adverse witnesses are being examined. In addition, this provision should operate to compel the juge d'instruction to permit the accused to be present at the preparatory examination when adverse witnesses are being examined in every case where the process verbal is to be used as other than more cumulative evidence at the accused's subsequent trial before a tribunal simple police or tribunal correctionnel. However, nothing in this paragraph or elsewhere in the treaty accords an accused a right to be present at his trial at any times, other than when adverse witnesses are being interrogated.

Paragraph 9(c) of Article VII of the treaty makes provision for the assistance of counsel but expressly excepts such right when "conditions prevailing for the time being in the receiving

state" do not permit such assistance. This paragraph, standing alone and apart from provisions in another paragraph of Article VII, adds nothing, in view of the excepting clause, to those rights to counsel inherent in the civil law itself. It could not oblige the juge d'instruction to permit the accused's counsel to be present during the interrogation of adverse witnesses at the preparatory examination. However, when considered in connection with paragraph 9(c) of Article VII it appears to assume more significance since the latter paragraph unequivocally provides that an accused shall have the right to be confronted with the witnesses against him. Paragraph 9(c) obligates the juge d'instruction to permit the accused to be present at the preparatory examination during his interrogation of adverse witnesses at least if his process verbal is to constitute prima facie evidence of the accused's guilt at his prospective trial. The juge could hardly convincingly assert that the "prevailing conditions" would prohibit the presence of the accused's counsel at the preparatory examination and at the same time admit that no similar considerations apply to the presence of the accused. On the other hand, paragraph 9(c) cannot be construed to accord the accused's counsel the right to be present at the accused's trial or the preparatory examination at any other time.

Deficiencies in the Civil Law Unaffected by SOFA

Certain deficiencies inherent in the civil law, as measured

by due process, were wholly unaffected by any provisions of the Status of Forces Agreement. These deficiencies are: (a) the right to cross-examine witnesses, (b) the right to a public trial under all the circumstances demanded by due process, and (c) the right to exclude involuntary confessions as evidence against the accused.

Right Created by SOFA Not Implied in Due Process or the Civil Law

Subparagraph 9(g) of Article VII of the Status of Forces Agreement extends to an accused a right which is implied neither in due process nor in the civil law. That provision permits an accused to communicate with a representative of the Government of the United States and to have such representative at his trial when the rules of the court permit. But the court is obligated by paragraph 9(c) of Article VII to permit the accused to be confronted with adverse witnesses and therefore to be present in court when they are being examined. Any refusal of the court to permit the presence of such representative during these times would appear to be highly arbitrary and inconsistent. Furthermore, the juge d'instruction would be hard put to justify the exclusion of such representative from the preparatory examinati while permitting the accused and his counsel to be so present.

CHAPTER V AN APPRAISAL OF THE SENATE INTENT, AS EXPRESSED IN THE RESOLUTION OF 15 JULY 1953, REGARDING TRIALS OF UNITED STATES PERSONNEL IN FOREIGN TRIBUNALS

The United States Senate was unwilling to ratify the Status of Forces Agreement as originally drafted by the Defense Department and agreed to in London on 19 June 1951. By its Resolution of Ratification it declared, in part, as follows: "Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States (and) if, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII (which requires the receiving state to give 'sympathetic consideration' to such request) - - - - -."[1]

The Senate manifestly considered that those rights and safeguards accorded accused persons by the criminal procedures of at least some of the NATO nations, plus those set forth in paragraphs

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[1]See Appendix A.

8 and 9 of Article VII of the Status of Forces Agreement, as approved in London, fall short of those constitutional rights which are afforded servicemen by criminal courts in the United States.

The intent of the Senate in including its reservation in its Resolution of Ratification of the Status of Forces Agreemen may be discerned from a consideration of various observations made by certain Senators on the floor of the Senate when the treaty was being considered for ratification. During this debat Senator Wiley[2] declared, "- - - - The committee naturally was anxious to insure, so far as possible, that American servicemen who may be tried in foreign courts are accorded all the essenti rights which they would receive under the Constitution of the United States. As I have indicated, a number of these rights are spelled out in the treaty, itself. Others are provided for the laws of the NATO countries. As an additional step the (Foreign Relations) Committee is recommending that the Senate attach to the resolution of ratification that (here a statement of the resolution). Mr. President, it seems to me that this is as far as the Senate can effectively go. It has been suggested that we should insist upon exclusive criminal jurisdiction over our troops abroad. Aside from the merits of exclusive jurisdiction, and it is by no means an unmixed blessing, the

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[2]Chairman of the Senate Foreign Relations Committee

suggestion is wholly impractical because the other countries simply will not agree to it."[3] It may be safely concluded, therefore, that the Senate intended, by its reservations, to assure that American servicemen, who are tried by foreign tribunals, shall be accorded at least those rights implicit in the due process clause of the Fourteenth Amendment to the Federal Constitution. That the Senate probably intended that the accused should not necessarily be accorded more than those rights is implicit in that part of the reservation which directs the State Department to protest to the foreign government in the event that any serviceman shall have been denied the equivalent certain rights by a foreign tribunal.[4]

There can be little doubt that the Senate would accept with extreme reluctance any refusal of a foreign government to permit the United States military authorities from exercising the primary right to jurisdiction in any case where requested and where such exercise would be necessary to prevent an injustice to the accused, as measured by due process standards. During the debate in the Senate, when the treaty was being considered for ratification, Senator Ferguson declared, "I would be greatly disappointed and would be the first to rise upon this floor to denounce any nation that refused to waive jurisdiction if they were not going

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[3] 99 Cong. Rec. 8730.
[4] See discussion of this part of the resolution, pp. 4-6, supr

to accord justice to the American soldier in compliance with provision number 2 (of the resolution) which I have read."[5]

Cognizant authorities of United States military forces stationed in NATO nations are well advised, therefore, to scrutinize with great care all criminal proceedings invoked by the authorities of a receiving state against any person, military or civilian, over whom they exercise military control, to make a prompt and resolute protest to appropriate local authorities where such action is warranted and, in cases where satisfactory relief cannot be effected locally, to fully and promptly report the facts to the appropriate American authorities. For such, it is submitted, is the clear intent of the Senate, as expressed in its reservations incorporated in its ratification of the treaty

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[5]99 Cong. Rec. 8837.

APPENDIX A

RESOLUTION OF RATIFICATION, WITH RESERVATIONS, AS AGREED TO BY THE SENATE ON JULY 15, 1953

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive T, Eighty-second Congress, second session, an agreement between the parties to the North Atlantic Treaty Regarding the Status of their Forces, signed at London on June 19, 1951.

It is the understanding of the Senate, which understanding inheres in its advice and consent to the ratification of the Agreement, that nothing in the Agreement diminishes, abridges, or alters the right of the United States of America to safeguard its own security by excluding or removing persons whose presence in the United States is deemed prejudicial to its safety or security, and that no person whose presence in the United States is deemed prejudicial to its safety or security shall be permitted to enter or remain in the United States.

In giving its advice and consent to ratification, it is the sense of the Senate that:

1. The criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements;

2. Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving State, under the treaty the Commanding Officer of the armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States;

3. If, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3(c) of Article VII (which requires the receiving state to give "sympathetic consideration" to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives.

4. A representative of the United States to be appointed by the Chief of Diplomatic Mission with the advice of the senior United States military representative in the receiving state will

attend the trial of any such person by the authorities of a receiving state under the agreement, and any failure to comply with the provisions of paragraph 9 of Article VII of the agreement shall be reported to the commanding officer of the armed forces of the United States in such state who shall then request the Department of State to take appropriate action to protect the rights of the accused, and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives.

APPENDIX B

PERTINENT EXCERPTS FROM THE NATO STATUS OF FORCES AGREEMENT

ARTICLE I, PARAGRAPH I

In this agreement the expression - -

(a) "force" means the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a "force" for the purposes of the present Agreement;

(b) "civilian component" means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located;

(c) "dependent" means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support;

(d) "sending State" means the Contracting Party to which the force belongs;

(e) "receiving State" means the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit;

(f) "military authorities of the sending State" means those authorities of a sending State who are empowered by its law to enforce the military law of that State with respect to members of its forces or civilian components;

(g) "North Atlantic Council" means the Council established by Article 9 of the North Atlantic Treaty or any of its subsidiary bodies authorised to act on its behalf.

ARTICLE VII, PARAGRAPH I

Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

ARTICLE VII, PARAGRAPH 2

(a) the military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

ARTICLE VII, PARAGRAPH 3

In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

ARTICLE VII, PARAGRAPH 8

Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving or has served, his sentence or has been pardoned, he may not be tried again for the same offence with the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation

of rules of discipline arising from act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

ARTICLE VII, PARAGRAPH 9

Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled --

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;

(e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

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